United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7180

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

TRAMP SHIPPING CO., INC.,
Plaintiff-Appellee,

—against—

GOTAAS LARSEN A.S., SANKO STEAMSHIP CO., LTD., PARABOLA SHIPPING UK LTD., HIMOFF MARITIME ENTERPRISES, LTD.,
Defendants-Appellees,

and

—against—

EMERALD SHIPPING CORP. (LIBERIA),
Defendant-Intervenor-Appellee,

and

—against—

MARDORF PEACH & CO. LTD.,
Defendant-Appellant.

APPEAL FROM UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF DEFENDANT-APPELLANT, MARDORF PEACH & CO. LTD.

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Statement

This is an appeal by Mardorf Peach & Co. Ltd. from a Memorandum Order and Decision of Judge Henry F. Werker filed October 16, 1975, and an order filed March 9, 1976, compelling Mardorf Peach & Co. Ltd. to submit to

a consolidated arbitration proceeding with the owners of the vessel AGIA ERINI II, a time charterer, Gotaas Larsen A/S, and four alleged sub-charterers, viz: Emerald Shipping Corporation, Sanko Steamship Co. Ltd., Parabola Shipping (UK) Ltd. and Himoff Maritime Enterprises Ltd.

Issues Presented

I. Whether, at the suit of a vessel owner, a court has power or authority to compel the consolidation of arbitrations between some six charterers and alleged sub-charterers when none of the arbitrations had been commenced and only one had been demanded (between the vessel owner and his immediate charterer) at the time of the filing of the complaint.

II. Whether such a consolidation can be compelled in the absence of a continuous and unbroken chain of charters each containing a *written* arbitration agreement.

III. Whether such a consolidation can be compelled in the absence of a complete chain of claims for indemnity by each successive charterer against the next charterer down the chain.

IV. Whether the last sub-charterer (Mardorf Peach & Co. Ltd.) in a chain of sub-charterers can be compelled to arbitrate with the vessel owner and five other alleged charterers, with whom there is no privity of contract, absent either a valid demand for arbitration by its immediate disponent-owner and/or absent a petition by its immediate disponent-owner pursuant to Section 4, Title 9 United States Code (U.S. Arbitration Act) or may the court *sua sponte* compel such arbitration in the circumstances.

V. Whether a sub-charterer (Himoff Maritime Enterprises Ltd.) who has been adjudicated a bankrupt can properly pursue a claim for indemnity in arbitration, or in a consolidated arbitration proceeding, for a contingent liability to its disponent-owner (Parabola Shipping (UK) Ltd.) in view of the bankruptcy injunction against "actions" against the bankrupt.

VI. Whether the court below erred in answering the foregoing questions affirmatively and ordering appellant to submit to a consolidated arbitration proceeding with the vessel owner, a time-charterer and four alleged sub-charterers, one of whom is an adjudicated bankrupt and another of which has neither claimed against, nor demanded arbitration with, and is now enjoined from prosecuting an action against, the bankrupt sub-charterer.

Statement of the Case

Mardorf Peach & Co. Ltd. a foreign corporation not doing business in New York (hereinafter "Mardorf") time-chartered the vessel AGIA ERINI II from Himoff Maritime Enterprises Ltd. a foreign corporation (hereinafter "Himoff") on September 13, 1974. Himoff was the fifth charterer in a chain of alleged charterers of the vessel.

The Mardorf charter was concluded in Montreal, Canada, for a time-chartered voyage to the specifically named port of Churchill, Manitoba, Canada. The charter, therefore, did not contain any warranty or undertaking by Mardorf as to the safety of the port of Churchill. Owner (Himoff) undertook the obligation that the vessel would go to that port. Mardorf was not aware of the terms of any of the other charters.

The vessel called at Churchill in October 1974.

This action was begun on March 27, 1975 when Tramp Shipping Co. Inc., the title owners of the AGIA ERINI II (hereinafter "Tramp" or "plaintiff") filed a complaint naming as defendants five charterers and sub-charterers of the vessel, viz: Gotaas Larsen A/S (hereinafter "Gotaas"), Sanko Steamship Co. Ltd. (hereinafter "Sanko"), Parabola Shipping (U.K.) Ltd. (hereinafter "Parabola"), Himoff and Mardorf. The complaint alleged that the vessel sustained damage to the extent of $2,700,000.00 approaching and leaving the port of Churchill.

The defendants named in the complaint were not the complete list of sub-charterers in the chain. Emerald Shipping Co. Ltd. (hereinafter "Emerald") had been omitted. It obliged the plaintiff, however, by moving to intervene and its motion was granted without opposition.

Further, as it turned out, the chain of privity was incomplete because no evidence has been offered that any charter exists between Parabola and Himoff (and hence no written arbitration agreement).

Finally, plaintiff did not and could not perfect jurisdiction over Mardorf.

The complaint prayed for money damages in the sum of $2,700,000.00 and, alternatively, for an unprecedented order compelling the consolidation of *non-existent* arbitration proceedings among the various charterers which had neither been demanded nor commenced, except for an arbitration which plaintiff had demanded of its immediate charterer, Gotaas.

When the defendants-appellees over whom the court had jurisdiction answered the complaint, Gotaas and Emerald cross-claimed against the other defendants praying that "an order be issued to compel defendants to proceed to arbitration of the disputes herein in a consolidated arbitration."

Parabola, however, did not cross-claim against Himoff. Instead Himoff and Parabola filed a joint answer containing a joint cross-claim against Mardorf in which they prayed, in the "wherefore" clause, that if arbitration were ordered between Parabola *or* Himoff *and* any other party, arbitration should also be ordered between Himoff and Mardorf.

Since Mardorf had not been served with process under the original complaint, Himoff's cross-claim was the first attempt to bring Mardorf before the Court when Himoff on May 28, 1975, attempted personal service of the cross-claim (without process) on Mardorf Peach & Co. (Canada) Ltd. which was not an agent of Mardorf. Mardorf moved to dismiss the cross-claim and vacate the attempted service.

On August 7, 1975, Himoff purported to demand arbitration with Mardorf by letter sent by Himoff's counsel to Mardorf. The letter did not name an arbitrator, in accordance with the provisions of the Himoff-Mardorf charter party nor did it specify any dispute between Himoff and Mardorf except an oblique reference to claims asserted in the litigation by plaintiff.

In addition, Himoff's counsel made a second attempted service on Mardorf by the mailing of an "additional" summons, the complaint and Himoff's answer and cross-claim to Mardorf in London purportedly under Rule 4(i) of the Federal Rules of Civil Procedure.

On August 19, 1975, the court below filed a memorandum endorsed on Mardorf's motion papers denying its motion to dismiss the cross-claim and stating that its motion to vacate the first attempted service had been mooted.

On August 29, 1975, Mardorf moved the court for a rehearing of its earlier motion and for an order vacating the second attempted service.

Plaintiff meanwhile, on June 1, 1975, had moved the court for an order consolidating the various alleged arbitrations none of which had yet been demanded or commenced, except as between plaintiff and Gotaas. Still there was no claim by Parabola against Himoff and, for this reason, Himoff's asserted cross-claim against Mardorf could not be based on any possibility of liability to Parabola. In this posture of things, at the court's direction, Mardorf submitted an affidavit and a memorandum of law in opposition to plaintiff's motion for a consolidated arbitration.

On October 16, 1975, notwithstanding an incomplete chain of enforceable arbitration agreements, the court below ordered Mardorf to proceed to a consolidated arbitration and directed that an order be submitted to that effect. No order was submitted and Mardorf took a precautionary appeal from the court's Memorandum Decision.

On March 9, 1976, the court below filed an order directing Mardorf to participate in a consolidated arbitration with appellees. It is this order and the decision filed October 16, 1975 which are the subjects of Mardorf's present appeal.

Statement of Facts Relevant to the Issues

The Charter Parties

Appellees have alleged that all the charter parties are of the same tenor and all provided for New York arbitration. All of the *written* charters are on the New York Produce Exchange form and all provide for New York arbitration. But there the similarity ends (App. 12a, 25a, 35a, 36a, 39a).

All, except the charter to Mardorf, are "period" charters i.e. for a stated period of time. The Mardorf charter is a "trip" charter i.e. not a "period of time" but for a

voyage between named places. Thus all the *written* charters, except the Mardorf charter, described the term of the charter as follows:

> "WITNESSETH, that the said Owners agree to let and the said Charterers agree to hire the said vessel, from the time of delivery, for about [fixed period, with certain options] * * * *".

The Mardorf charter on the other hand is for a "trip" described as follows:

> "WITNESSETH, that the said Owners agree to let and the said Charterers agree to hire the said vessel, from the time of delivery, for about one time charter trip via Churchill, Manitoba and St. Lawrence/East Coast Canada and/or Chaleurbay or U.S. North of Hatteras, first port of call, Churchill * * * *". (App. 25a)

All the *written* charters, except the Mardorf charter, have a so-called "safe port" warranty, because no ports are specifically named. The Mardorf charter does not have that warranty because it is for specific ports, including Churchill, to which Himoff agreed to send the vessel without any undertaking by Mardorf as to their safety.

Thus, stripped of irrelevant language, all the *written* charters, except the Mardorf charter, provided in lines 18 through 35:

> "Vessel to be placed at disposal of the Charterers at [named place] * * *. Vessel on her delivery to be ready to receive cargo . . . to be employed, in carrying lawful merchandise . . . in such lawful trades, *between safe port and/or ports,* British North America (and other geographical areas) as Charterers or their agents shall direct * * * *". (Emphasis added.)

The words "between safe port and/or ports" constitute the so-called safe port warranty.

Being a "trip" and not a "period" charter, the Mardorf charter had the words "between safe port and/or ports" deleted and hence did not contain a safe port warranty. Thus the Mardorf charter contains the following strike-out of language appearing in the other charters as follows:

> "Vessel to be placed at disposal of the Charters at (sic) on dropping outward sea pilot, Hamburg. * * * Vessel on her delivery to be ready to receive cargo . . . , to be employed, in carrying lawful merchandise . . . in such lawful trades, ~~between safe port and/or ports, British North America (and other geographical areas)~~ as Charterers or their Agents shall direct * * * ".

The fact that Himoff and Mardorf deliberately agreed that Mardorf made no undertaking as to the safety of the port of Churchill is emphasized by the special typewritten Clause 34 in their charter in which Himoff exacted from Mardorf extra insurance costs necessary to permit the vessel to go to Churchill (App. 144a). Clause 34 provides:

> "*Charterers to reimburse Owners with an amount up to $27,000.00 towards extra insurance assessed by the Underwriters, for trading Churchill.* Owners eventually to support such extra insurance by Underwriters' invoice. Any excess over $27,000.00 is to be absorbed by the Owners." (Emphasis added.)

The head charter, dated December 18, 1969, between plaintiff and Emerald restricted Emerald to trading "within Institute Warranty Limits" (lines 29 and 32) (App. 12a). These limits excluded trading to Churchill. The plaintiff, therefore, was not required to send the

vessel to Churchill. Evidently, plaintiff agreed to do so on being paid the extra insurance costs involved which Himoff passed on to Mardorf when Himoff specifically agreed to have the vessel call at Churchill (App. 144a).

Plaintiff's complaint alleges that plaintiff sustained damages as a result of "unsafe conditions prevailing in the *port* of Churchill". (Emphasis added.) (App. 7a). Inasmuch as the Mardorf charter did not contain a safe port warranty, and indeed struck it out, there can be no issues of law or fact arising under the Mardorf charter which are common to any disputes which plaintiff's claim may create under any of the other charters. Absent such common issues of law or fact, no basis exists for including Mardorf in the consolidation.

Finally, there is no proof of any charter party between Parabola and Himoff, which have been said to be affiliated companies. Counsel for Himoff has intimated that there was an oral charter party between these related parties. If this be so, the record is barren of any evidence of its terms and conditions. Obviously if there was a charter party which contained an agreement to arbitrate, that agreement would have been oral and unenforceable. Furthermore, so far as the record discloses, no claim has been made by Parabola against Himoff with the result that Himoff has no basis for claiming indemnity from Mardorf.

The Himoff Demand for Arbitration with Mardorf

The arbitration clause in the Himoff-Mardorf charter sets forth the procedure for demanding arbitration as follows:

> "17. That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, *one to be*

> *appointed by each of the parties* hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men." (Emphasis added.)

Notwithstanding the clear directive of Clause 17 of the charter party, Himoff never named an arbitrator in its demand for arbitration dated August 7, 1975. In fact, the demand for arbitration stated that Himoff would not name an arbitrator (App. 132a).

Himoff, the only defendant-appellee entitled to do so, has never petitioned the court below for an order compelling Mardorf to arbitrate, as required by Section 4 of Title 9 of the United States Code.

The Issue of the Existence of a Himoff-Parabola Charter

It must be emphasized that no evidence has been presented of a charter between Himoff and Parabola for the AGIA ERINI. It follows that no evidence was presented that a *written* agreement to arbitrate ever existed between these two parties as required by Section 2 of Title 9 of the United States Code.

Secondly, no evidence was presented to the court below that arbitration of the instant dispute had been demanded of Himoff by Parabola. Certainly the record below is clear that no cross-claim has been made by Parabola against Himoff.

Thus, it must appear that since no evidence was presented to the court below of an enforceable charter party contract between Himoff and Parabola, Parabola has no basis upon which to demand indemnity from Himoff and thus Himoff would have no claim against Mardorf.

Finally, absent a charter between Himoff and Parabola containing an enforceable arbitration agreement, there is no contractual chain linking appellant, Mardorf, with any of the named appellees other than Himoff and, therefore, the contractual privity essential to a consolidation of arbitrations is completely lacking so far as Mardorf is concerned.

The Bankruptcy of Himoff

On September 18, 1975 the creditors of Himoff filed an involuntary petition in bankruptcy against Himoff in the United States District Court for the Southern District of New York. On January 7, 1976, the Bankruptcy Court ordered that Himoff be adjudicated pursuant to Chapters I-VIII of the Bankruptcy Act which pertain to straight bankruptcies.

As of the date of this writing, proceedings in bankruptcy are going forward to marshal the assets of Himoff and determine the claims of creditors.

POINT I

The Orders Appealed From Are Final and Appealable.

In *Compania Espanola de Pet., S.A.* v. *Nereus Ship.*, 527 F.2d 966 (2nd Cir., 1975), in considering the appealability of an order directing a party to participate in a consolidated arbitration, this Court held that:

> "... [I]nasmuch as the order [compelling arbitration] is conclusive on the issue of the obligation of the parties to arbitrate and how they are to arbitrate, and has a final and irreparable effect on the rights of the parties, it is appealable. The order not only mandated the procedural step of consolidation, it also

> obligated the parties to arbitrate, thereby affecting their substantive rights. It finally adjudicated claims of right separable from, and collateral to, the rights that will be determined by the arbitrators. Those claims of right are too important to be denied review and too independent of the cause itself to preclude the parties from seeking appellate review until the arbitration is concluded." *Id.* at 973.

The orders appealed from are to the same effect and under the authority of the *Nereus* case (*supra*) are final and appealable.

POINT II

The Consolidation of Non-Existent Arbitrations With an Existing Arbitration Is Without Precedent or Authority and Should Not Be Allowed.

In *Vigo Steamship Co.* v. *Marship Corp. of Monrovia*, 26 N.Y. 2d 157 (N.Y. 1970) *cert. denied* 400 U.S. 819, the New York Court of Appeals found the necessary authority to consolidate arbitrations in Section 602 of the New York Civil Practice Law and Rules which provided for the consolidation of "actions" where the separate arbitrations presented common issues of law or fact.

Following the lead of the *Vigo* decision, the Federal Courts found authority for such consolidations in Rule 42(a) of the Federal Rules of Civil Procedure. *Compania Espanola de Pet., S.A.* v. *Nereus Ship.*, 527 F.2d 966 (2nd Cir., 1975). Rule 42(a) provides:

> (a) Consolidation. When actions involving a common question of law or fact *are pending* before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order

> all the *actions* consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. (Emphasis added.)

It is clear that the principle of consolidation, based upon Rule 42(a) of the Federal Rules of Civil Procedure, may only be invoked to consolidate actions *already pending. See, Pan Am. World Airways, Inc.* v. *U.S. Dist. Ct., C.D. Cal.*, 523 F.2d 1073, 1080 (9th Cir. 1975).

Since the primary basis for consolidation under these rules is the existence of "common issues of law or fact", it is essential that the "actions" to be consolidated be "pending".

No precedent has been found to support the procedure adopted by the plaintiff here of filing a "dragnet" complaint alleging the existence of a series of charters and then moving to consolidate arbitrations between the parties to the several charters even though, except for an arbitration between plaintiff and its immediate charterer, arbitrations between the parties to the various sub-charters had neither been commenced nor demanded.

This procedure, if condoned, will extend the rather recent application of the Federal Rules of Civil Procedure to consolidation of arbitrations to unmanageable proportions, as has occurred here. It will proliferate rather than curtail or streamline litigation. In the process, it will work injustices, as have occurred in the case at bar, by involving parties which ought not be caught up in the controversy. Later Points in this brief will demonstrate that Mardorf is the victim of such injustice by being drawn into defending this expensive litigation because, by reason of the special terms of its charter, it cannot have any responsibility for the alleged damages to plaintiff's vessel nor any liability to indemnify any of the other parties.

POINT III

Absent Issues of Law or Fact Common to Mardorf and All Other Parties, Consolidation of Arbitrations Is Not Authorized.

Appellees have contended that the charters are "back to back" or contain *identical* terms. As shown at pages 6-9, *supra*, the material terms of the Mardorf charter differ significantly from those of the other written charters.

The head charter, dated December 18, 1969, between plaintiff and Emerald restricted the vessel from trading outside "Institute Warranty Limits" (lines 29 and 32) (App. 12a). These limits excluded trading to Churchill. The charters among the appellees, Gotaas, Sanko and Parabola contained the same restrictions but granted the option of trading outside Institute Warranty Limits upon the charterer paying the extra insurance costs. All three charters *warranted the safety of the port* (line 27) (App. 12a, 36a, 39a).

The charter from Himoff to Mardorf, however, named Churchill as a specific port of call and the safe port warranty was *specifically stricken out* (line 27) (App. 25a).

The acceptance by an owner of a named port or berth constitutes an assumption of the risks to be encountered. *Tweedie Trading Co.* v. *New York & Boston at Dyewood Co.*, 127 F. 278 (2nd Cir., 1903); *Pan Cargo Shipping Corporation* v. *United States*, 234 F. Supp. 623 (S.D.N.Y., 1964) *aff'd* 373 F.2d 525, *cert. denied* 389 U.S. 836.

Accordingly, material differences between Mardorf's charter and the charters among appellees demand separate and distinct treatment. In a much less flagrant case, Judge Cannella denied consolidation where two charters were on the same form of charter party and identical

in their material terms. In *Showa Shipping Co.* v. *A/B Bellis*, 1973 A.M.C. 2458 (S.D.N.Y.) (otherwise unreported) the dispute concerned a misrepresentation of the size of the vessel which was contained in both charter parties. Judge Carnella in denying consolidation stated:

> "In the instant case, Asiatic claims upon an alleged material misrepresentation made to it by Showa and Showa bases its claim against Bellis on the same alleged misrepresentation. Although the same misrepresentation is the same in the case of each claim, the proofs as to the fact of the misrepresentation and its materiality may widely differ in the case of each of the separately negotiated charter parties. *Respondents claim confusion, to their prejudice, will result in the event of consolidation of these causes. On this ground, the motion to consolidate is denied.*" (Emphasis added.) *Id.* at 2459.

POINT IV

An Agreement to Arbitrate Must Be in Writing to Be Enforceable.

In order to have a complete chain of enforceable arbitration agreements connecting Mardorf to plaintiff, it must be shown that all of the intermediate arbitration agreements are in writing and the same in all material respects.

Section 2 of Title 9 of the United States Code provides:

> "**§2. Validity, irrevocability and enforcement of agreements to arbitrate**
>
> A *written* provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter aris-

> ing out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (Emphasis added.)

In *Garnac Grain Company* v. *Nimpex International, Inc.*, 249 F. Supp. 986 (S.D.N.Y., 1964) Garnac petitioned the court for an order directing Nimpex to proceed to arbitration. The court noted that while Garnac's chartering broker had concluded an oral charter fixture referring to a form of charter party which included an arbitration clause (the same clause as in the case at bar) the written charter party was never signed. Nimpex failed to tender the vessel and Garnac was forced to charter a substitute.

Judge Metzner denied Garnac's petition to compel Nimpex to arbitrate stating:

> "The parties never entered into a written agreement for arbitration * * *", as required by section 4.A written agreement for arbitration is the sine qua non of an enforceable arbitration agreement. Fisser v. International Bank, 282 F.2d 231 (2d Cir. 1960). Although courts have compelled arbitration on the basis of fixture letters, see Dover S.S. Co. v. Summit Industrial Corp., 148 F. Supp. 206 (S.D.N.Y., 1957); cf. Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978 (2d Cir. 1942), *no case has been found, nor has one been cited to us, compelling arbitration on the basis of an oral fixture.* The case of Fisser v. International Bank, 17[illegible] F. Supp. 305 (S.D.N.Y., 1958), cited by the petitioner is inapposite, for in that case there

> was concededly a written agreement for arbitration, and the only question confronting the court was whether respondent under general principles of contract law was a party to the agreement.
>
> Section 4 requires at least a written fixture making reference to a standing charter containing an arbitration clause, before arbitration can be compelled. (Emphasis added.) *Id.*

Himoff and the other appellees have contended that Mardorf should be ordered to participate in a consolidated arbitration because there is a continuous chain of similar charters and arbitration clauses connecting Mardorf to plaintiff. However, as pointed out at page 9, *supra*, there is no evidence of record of any written charter or valid and enforceable arbitration agreement between Himoff and Parabola. Therefore, there is a fatal break in the chain of privity at the Parabola-Himoff level. Mardorf respectfully submits that because of this break in the chain it cannot be compelled to participate in a consolidated arbitration.

Secondly, Himoff bases its cross-claim against Mardorf on an indemnity theory, alleging that if arbitration were ordered between Himoff and any other party then arbitration should be ordered between Mardorf and Himoff. However, absent an enforceable arbitration agreement between Himoff and Parabola, Himoff cannot be ordered to arbitrate with Parabola or any party above it in the chain and thus Himoff would have no basis for an indemnity claim against Mardorf.

POINT V

Parties May Not Be Compelled to Participate in a Consolidated Arbitration Unless in an Unbroken Chain of Privity of Contract.

Plaintiff and defendants-appellees have attempted to claim that they are entitled to demand a consolidated arbitration with Mardorf. The principle of privity of contract is well established and provides the foundation upon which the parties to a particular contract may rely in determining their particular rights and responsibilities with respect to the particular terms of the contract. In *Ger. Alliance Ins. Co.* v. *Home Water Co.*, 226 U.S. 220, 33 S. Ct., 32, 57 L.Ed. 195 (1912), a taxpayer brought an action against a water supply company for damages resulting from a failure of the supply company to perform its contract with the municipality. With respect to the question of the taxpayer's right to sue upon a contract to which it was not a party the Court stated:

> "In many jurisdictions a third person may now sue for the breach of a contract made for his benefit. The rule as to when this can be done varies in the different States. In some he must be the sole beneficiary. In others it must appear that one of the parties owed him a debt or duty, creating the privity, necessary to enable him to hold the promisor liable. Others make further conditions. But even where the right is most liberally granted it is recognized as an exception to the general principle, which proceeds on the legal and natural presumption, that a contract is only intended for the benefit of those who made it. Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a

> party, he must, at least show that it was intended for his *direct* benefit. For, as said by this court, speaking of the right of bondholders to sue a third party who had made an agreement with the obligor to discharge the bonds, they "may have had an indirect interest in the performance of the undertakings, but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names." *Nat. Bk.* v. *Grand Lodge*, 98 U.S. 123, 124. *Hendrick* v. *Lindsay*, 93 U.S. 143, 149; *National Savings Bk.* v. *Ward*, 100 U.S. 195, 202, 205." *Id.* at p. 230. (Emphasis added.)

The Supreme Court then went on to hold that the plaintiff was not entitled to bring its action.

Mardorf has no contractual privity with any party except Himoff. In order for Mardorf to be compelled to participate in a consolidated arbitration, it is necessary that it be a link in an unbroken chain leading through each of the other parties to the plaintiff.

There are at least two breaks or missing links in the necessary chain of privity. As has been discussed under Point IV, there is no enforceable arbitration agreement between Himoff and Parabola. Furthermore, as will be discussed under Point VI, Himoff has been adjudicated a bankrupt which has the effect of enjoining "actions", which includes arbitrations against it.

Himoff has never made a proper demand for arbitration with Mardorf nor has it any basis for doing so. Moreover Himoff has never petitioned the court below under Section 4, Title 9, United States Code, to compel Mardorf to arbitrate. Therefore, in ordering a consolidated arbitration, the court below was acting *sua sponte* which it was not authorized to do (Point VII, *infra*), and in doing so

disregarded the absence of an unbroken chain of privity linking Mardorf to Parabola and the appellees above Parabola in the chain.

The justification given by the court below for ordering consolidation was "the prevention of possible inconsistent results and the minimization of time and expense to the parties. . ." (App. 164a). If the consolidated arbitration is permitted to proceed, despite the breaks in the chain of privity, the arbitrators will be required to deal with the effects of such breaks in the chain as they affect Mardorf, Himoff and Parabola. Such questions affect substantive rights but do not arise under any of the individual charters. They relate to procedures for consolidation which are not and should not be the concern of the arbitrators.

Arbitrators can only function within the four corners of a submission agreement (in this case, the arbitration clause contained in each charter party) and no further. *United Steelworkers of Amer.* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 at 597; to the same effect, see *Truck Drivers & Helpers Union Local 784* v. *Ulrz-Talbert Co.*, 330 F.2d 562, 562 (8th Cir., 1964) where the Court of Appeals stated:

> "As arbitration is a matter of contract, the answer to the question must lie within the four corners of the agreement between the parties." (Citing cases.)

Accordingly, in a consolidated arbitration it is necessary that the arbitrators make a determination with respect to parties to each separate charter in the chain. In effect, there would be separate awards under each charter which would be similar to the extent the chain of privity is unbroken and there are common issues of law and fact.

To require arbitrators to consider and decide substantive rights of parties where there is not a definite and clear

chain of privity would be to ask them to enter where courts fear to tread. It would be tantamount to asking them to violate the very basic and cardinal legal principle that no arbitration award may be made against one with whom the claimant had no arbitration agreement. Domke, *The Law and Practice of Commercial Arbitration*, Chapter 10, p. 78 (1968); *Industria E. Convercio De Minerios* v. *Nova Genuesis S.*, 172 F. Supp. 569 (E.D. Va., 1959) *aff'd* 310 F.2d 811.

It is fundamental in our system of law that the courts have no power to rewrite agreements made by independent parties. A consolidated arbitration may not change the *substantive* rights of the parties and therefore may not be used to require arbitrators to make an award for or against a party with whom the claimant or other parties have no contractual agreement. The arbitrators' determinations must be on a charter by charter basis so long as the chain is unbroken.

Counsel for Emerald and Gotaas recognized the sanctity of the principle of privity in Emerald's petition to intervene when he stated that:

> "if plaintiff is entitled to collect damages from Gotaas-Larsen A/S for negligence and breach of charter-party warranty, which is expressly denied, then Gotaas-Larsen A/S is entitled to collect by way of indemnity from Emerald for negligence and breach of charter-party warranty." (Affidavit of Charles S. Haight, Jr.)

The leading case on consolidation, *In the Matter of the Arbitration between Vigo Steamship and Marship Corp.*, 26 N.Y. 2d 157, *cert. denied*, 400 U.S. 819 (1970), cited in the court below by both plaintiff and the defendants-appellees who favored consolidated arbitration, resulted in an award

by the arbitrators in which they specifically recognized the sanctity of the doctrine of contractual privity when they said:

> There has been much said about the fact that this is one of the first consolidated arbitrations and, as commercial men we cannot help but concur with the Courts as to the practibility of such a proceeding where there are common questions to be decided. *However, it would appear that any Award in these circumstances must follow the privity of the contracts involved* . . . (Emphasis added.) (App. 191a).

If the chain of contracts is broken, for whatever reason, the arbitrators will have to consider and decide what their award should be with respect to the parties below the break in the chain. This is an issue arbitrators were never intended to decide. None of the arbitration agreements empower the arbitrators to determine such issues as they do not arise out of any of the individual charters.

There are at least two fatal breaks in the chain. The first is the absence of a charter between Himoff and Parabola. The second is the bankruptcy stay of arbitration proceedings against Himoff. If Parabola does not have an enforceable arbitration agreement with Himoff, then Himoff could not be forced to arbitrate with Parabola and Parabola's right to indemnity, if any, for any award which might be made against it would be the subject of a claim as a general creditor of Himoff in the bankruptcy proceeding. Then, and only then, could Mardorf become involved.

It is submitted that, as a result of the absence of a charter between Himoff and Parabola and the absence of an enforceable arbitration agreement between them, as well as the stay of arbitration proceedings against Himoff, there

are fatal breaks in the contractual chain of privity which render it improper to force Mardorf to participate in the consolidation ordered by the court below.

POINT VI

The Bankruptcy of Himoff Operates as a Stay of Arbitrations Against Himoff.

On January 7, 1976, Himoff was adjudicated a bankrupt pursuant to Chapters I-VII of the Bankruptcy Act (11 U.S.C. §1-112). Section 11a of the Act (11 U.S.C. §29) provides, in part:

> a. A *suit* which is founded upon a claim from which a discharge would be a release and which is pending against a person at the time of the filing of a petition by or against him, shall be stayed until an adjudication or the dismissal of the petition; if such a person is adjudged a bankrupt, such action may be further stayed until the question of his discharge is determined by the court after a hearing. . . . (Emphasis added.)

Section 11a must be read in conjunction with Rule 401(a) of the Rules of Bankruptcy Procedure. Rule 401(a) states, in part:

> The filing of a petition shall operate as a stay of the commencement or continuation of any *action* against the bankrupt or the enforcement of any judgment against him . . . (Emphasis added.)

The Advisory Committee's Note to this rule explains that "[T]his rule supplements and reinforces the policy of §11a. . .". Therefore the reference in Rule 401 to *action* rather than *suit* evidences an intent to include arbitration proceedings.

Inasmuch as there can be no arbitration proceeding against Himoff by virtue of the stay mandated by Rule 401(a) of the Bankruptcy Rules, Himoff cannot be compelled to arbitrate with any of the parties in the case at bar. As a result any claim by Himoff against Mardorf for indemnity and/or Himoff's demand for arbitration with Mardorf must fail for mootness.

POINT VII

Absent a Petition Under Section 4 of the United States Arbitration Act by Himoff to Compel Arbitration With Mardorf the Court Below Had No Jurisdiction to Direct Mardorf to Proceed to Consolidated Arbitration.

Appellees have maintained that the Court below had jurisdiction to compel Mardorf to proceed to a consolidated arbitration despite the fact that Mardorf was a foreign corporation not doing business in New York and notwithstanding the fact that the charter was not made in New York nor did the vessel call at New York during the period she was on charter to Mardorf (App. 72a, 73a, 75a, 79a). In support of their contention in the Court below appellees cited numerous authorities (e.g. *Farr & Co.* v. *Cia Intercontinental De Navegacion*, 144 F. Supp. 840 (S.D.N.Y., 1956) *aff'd* 243 F.2d 342 (1957).

Without exception, every case cited by appellees for the proposition that an agreement to arbitrate disputes in New York is a consent to the jurisdiction of the court arose under a petition to compel arbitration pursuant to Section 4 of Title 9 of the United States Code. That section states, in pertinent part:

§4. Failure to arbitrate under agreement; petition to United States Court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A *party aggrieved* by the alleged failure, neglect, or refusal of another to arbitrate under a *written* agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement*. . . . (Emphasis added.)

According to the language of Section 4, Himoff is the only party entitled to petition to compel Mardorf to arbitrate because it is the *only* party that can be "aggrieved" by Mardorf's failure or refusal to comply with the arbitration agreement between Himoff and Mardorf.

The moving party before the Court below was the plaintiff, who was not an "aggrieved" party under the Mardorf charter and who did not and could not "petition" under Section 4 to "compel" an arbitration with Mardorf. Plaintiff moved merely for an order to "consolidate arbitrations" among itself and defendants (App. 45a). Neither

did Himoff "petition" the Court below to compel Mardorf to arbitrate. Presumably the Court below considered that Himoff's cross-claim against Mardorf (App. 22a-24a) was in the nature of a Section 4 petition to compel arbitration. The "wherefore" clause in Himoff's cross-claim stated:

> 4. In the event arbitration is ordered to commence between PARABOLA SHIPPING (UK) LTD. and any other party or HIMOFF MARITIME ENTERPRISES, LTD. and any other party, that arbitration also be ordered by the court as between HIMOFF MARITIME ENTERPRISES LTD. and MARDORF PEACH LTD. pursuant to their Charter Party agreement dated September 13, 1974 and attached hereto as Exhibit "A". (App. 24a).

It is submitted that such a contingent and hypothetical prayer in a pleading can hardly be considered a "petition" within the meaning of Section 4. To permit this practice to pass for compliance with Section 4 would be to emasculate the statute and its protections and requirements.

It is basic that the jurisdiction of the District Courts to enforce arbitrations derives from the United States Arbitration Act. It follows that the court's jurisdiction may be invoked only in accordance with the terms of that Act, including Section 4. Since the court's jurisdiction with respect to Mardorf was not invoked in accordance with that Act, the court was without jurisdiction to compel Mardorf to arbitrate, much less to participate in a consolidated arbitration.

CONCLUSION

The Orders of the District Court should be reversed.

In the first place, the District Court was without jurisdiction to compel Mardorf to arbitrate for lack of compliance with the United States Arbitration Act.

Secondly, it was improper to order Mardorf to participate in a consolidated arbitration because there was no complete chain of privity of contract leading from Mardorf through all other appellees to plaintiff, no issues of law or fact common to Mardorf and appellees and the bankruptcy of Himoff has destroyed any possibility of an unbroken chain of arbitration awards which arbitrators might render reaching down to Mardorf.

Respectfully submitted,

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